

ARBITRATION TRIBUNAL

**CONSTITUTED BY VIRTUE OF THE REGULATION RESPECTING THE
GUARANTEE PLAN FOR NEW RESIDENTIAL BUILDINGS**

(O.C. 841-98 OF 17 JUNE 1998)

**ARBITRATION BODY AUTHORIZED BY THE RÉGIE DU BÂTIMENT DU QUÉBEC
RESPONSIBLE FOR THE ADMINISTRATION OF THE BUILDING ACT (R.S.Q., C.
B-1.1)**

UNDER THE AEGIS OF

SOCIÉTÉ POUR LA RÉOLUTION DES CONFLITS INC. (SORECONI)

CANADA
PROVINCE OF QUÉBEC

FILE N°: 210710003
FILE N°: 167753-5571
GUARANTEE PLAN:

DATE: FEBRUARY 6, 2023

IN THE PRESENCE OF: M^{RE} TIBOR HOLLÄNDER

HESHMATULLAH HAJIZADEH AND YALDA KHATIZ

«BENEFICIARIES»

-and-

VIVESCO INC.

«CONTRACTOR»

-and-

GARANTIE CONSTRUCTION RÉSIDENTIELLE (GCR)

«MANAGER OF THE GUARANTEE PLAN»

ARBITRATION AWARD

THE PARTIES

[1.] The parties are identified below:

MR. HESHMATULLAH HAJIZADEH

MS. YALDA KHATIZ

1819 Balmoral

Saint-Hubert, Québec,

J4T 1B5

BENEFICIARIES

MR. JONATHAN BELISLE

Vivesco Inc.

1006 Gardenville

Longueuil, Québec

J4J 3B6

CONTRACTOR

MTRE PIERRE-MARC BOYER

Garantie Construction Résidentielle
(GCR)

4101, Molson, suite 300

Montréal, Québec,

H1Y 3L1

ATTORNEY FOR THE MANAGER

[2.] The following persons were present before the Tribunal:

[2.1] Mr. Heshmatullah Hajizadeh, one of the Beneficiaries;

[2.2] Mr. Jonathan Belisle, the Contractor's representative;

[2.3] Me Pierre-Marc Boyer represented the Manager, *Garantie Construction Résidentielle* (GCR); and

[2.4] Mr. Benoit Pelletier, rendered the Decision of September 28, 2021.

THE REQUEST FOR ARBITRATION

[3.] The Beneficiaries have requested arbitration from the decision rendered by Mr. Benoit Pelletier, on September 28, 2021 ("**Decision**").

[4.] The Manager applied article 27.(3) of the *Regulation respecting the guarantee plan for new residential buildings*, chapter B-1.1, r. 8 ("**Regulation**") to dismiss the Beneficiaries claims concerning Points 2, 3, 4, 12 and 13.

CHRONOLOGY

2018-12-03	<i>Plans d'implantation</i> prepared by Fabien Grutman arpenteur-géomètre inc. (Exhibit A-9)
2019-12-13	Partial Payment Certificate issued by Garantie Construction Résidentielle (Exhibit A-1)
2020-01-	Partial Payment Certificate issued by Garantie Construction Résidentielle (Exhibit A-1)
	Guarantee Contract/Buldings held in Undivided Co-ownership (Exhibit A-2)
2019-12-14	Preliminary Contract/House or Building (Immoveable) Held in Undivided Co-ownership (Exhibit A-3)
2020-02-17	Inspection Report prepared by Yevgeny Govshievich of Home Inspection Services

	(Exhibit A-11)
2020-02-21	Pre-Acceptance Inspection Form / Building Held in Undivided Co-ownership or Building held in Divided Co-ownership / Private Portion (Exhibit A-10)
2021-01-14	Denunciation email dated January 14, 2021, sent by the Beneficiaries to the Contractor to which is attached: The denunciation form (Contractor Complaint Form) sent on January 14, 2021 (Exhibit A-4) FORMULAIRE DE RÉCLAMATION* BÂTIMENT UNIFAMILIAL OU MULTIFAMILIAL OU BÂTIMENT DÉTENU EN COPROPRIÉTÉ DIVISE • PARTIE PRIVATIVE (Exhibit A-5)
2021-01-13	Email communication from the Contractor to the Beneficiaries (Exhibit A-7)
2021-01-16	Email communication from the Beneficiaries to the Contractor (Exhibit A-7)
2021-01-19	Email communication from the Beneficiaries to the Contractor and the Manager (Exhibit A-7)
2021-01-19	Email communication from the Contractor to the Beneficiaries (Exhibit A-7)
2021-01-25	Email communication from the Beneficiaries to the Contractor and the Manager (Exhibit A-8)
2021-01-25	Email communication from the Contractor to the Beneficiaries (Exhibit A-8)
2021-02-25	15-day notice sent by email dated February 25, 2021, with attachments: The denunciation form already submitted as Exhibit A-4; the Contractor's Action Form, blank (not included) (Exhibit A-6)
2021-05-21	The Manager's Decision of May 14, 2021 (Exhibit A-12)
2021-05-22	Canada Post Receipt for the Manager's Decision of May 14, 2021 (Exhibit A-12)
2021-09-28	The Manager's decision of September 28, 2021 (Exhibit A-12)
2021-10-07	Canada Post Receipt for the Manager's Decision of September 28, 2021 (Exhibit A-12)
2021-10-07	The Beneficiaries' request for arbitration involving the Manager's Decision of September 28, 2021 (Exhibit A-13)
2021-11-03	Email from the arbitration body dated November 3, 2021, to which are joined: the letter of notification and the appointment of the arbitrator dated November 3, 2021; the Manager's Decision of September 28, 2021 (Exhibit A-13)
2022-03-18	Management Conference
2022-12-14	Date of Hearing of the Beneficiaries' request for arbitration

MANDATE

[5.] On October 7, 2021, the Beneficiaries filed a request for arbitration¹ and the undersigned was named arbitrator on November 3, 2021².

JURISDICTION

[6.] The parties did not challenge the competence or jurisdiction of the Tribunal and the jurisdiction of the Tribunal is therefore confirmed.

¹ Exhibit A-13

² Exhibit A-13

EXHIBITS

- [7.] The Exhibits have been initially labeled and numbered “**A-**” in accordance with the numbering of the Book of Exhibits filed by the Manager. The Beneficiaries exhibits are numbered and labeled “**B-**”. The Contractor did not file any exhibits.

THE MANAGER’S EXHIBITS

- [8.] The exhibits listed below were assembled by the Manager and submitted to the parties:

Document(s) contractuel(s)

- A-1 *En liasse*, attestations d'acompte signés par les Bénéficiaires et l'Entrepreneur le 13 décembre 2019 ainsi qu'en janvier 2020;
- A-2 Contrat de garantie signé par les Bénéficiaires et l'Entrepreneur le 13 décembre 2019;
- A-3 Contrat préliminaire signé par les Bénéficiaires et l'Entrepreneur le 14 décembre 2019;

Dénonciation(s) et réclamation(s)

- A-4 Courriel de dénonciation envoyé par les Bénéficiaires à l'Entrepreneur daté du 14 janvier 2021 auquel est joint :
 - Le formulaire de dénonciation envoyé le 14 janvier 2021;
- A-5 Formulaire de réclamation envoyé par les Bénéficiaires ;
- A-6 Courriel de l'avis de 15 jours daté du 25 février 2021 auquel sont joints :
 - Le formulaire de dénonciation déjà soumis en A-4;
 - Le formulaire des mesures à prendre par l'entrepreneur, vierge (non inclu à la présente);

Correspondances

- A-7 Échange de courriels entre les Bénéficiaires et l'Entrepreneur entre le 13 et le 19 janvier 2021;
- A-8 Échange de courriels entre les Bénéficiaires et l'Entrepreneur daté du 25 janvier 2021;

Autres documents pertinents

- A-9 Plans d'implantation;
- A-10 Formulaire d'inspection préreception signé par les Bénéficiaires et l'Entrepreneur le 17 février 2020;
- A-11 Rapport d'inspection daté du 17 février 2020;

Décision(s) et demande d'arbitrage

- A-12 *En liasse*, la décision de l'Administrateur datée du 14 mai 2021, la décision supplémentaire de l'Administrateur datée du 26 septembre 2021 ainsi que les accusés réception de Postes Canada des Bénéficiaires datés du 22 mai et du 7 octobre 2021;
- A-13 Courriel de la notification de l'organisme d'arbitrage daté du 3 novembre 2021 auquel sont joints :
 - La demande d'arbitrage des Bénéficiaires datée du 7 octobre 2021 ;
 - La lettre de notification ainsi que la nomination de l'arbitre datée du 3 novembre

- 2021;
- La décision de l'Administrateur déjà soumise en en A-12 ;
- A-14 Curriculum Vitae de Benoit Pelletier.

THE BENEFICIARIES' EXHIBITS

[9.] The Beneficiaries filed the exhibits listed below:

- B-1 *En liasse*, email dated April 6, 2022 (5:01:39PM) with attachments:
- A document named "*Additional information*" consisting of:
 - ❖ an email dated July 20, 2021, from Mr. Pelletier to Mr. Belisle;
 - ❖ an email from Mr. Hajizadeh to Mr. Pelletier dated July 19, 2021;
 - ❖ an email dated August 11, 2021, from Mr. Pelletier to Mr. Belisle;
 - ❖ an email from Mr. Hajizadeh to Mr. Pelletier dated August 11, 2021;
 - Copy of the Manager's Decision of May 14, 2021; and
 - Copy of the Manager's Decision of September 28, 2021.
- B-2 An email dated June 7, 2022 (7:17:24 PM)

PRELIMINARY OBSERVATIONS

[10.] The Tribunal shall first set out the facts, documents and exhibits that are relevant to the award that shall be rendered.

[11.] The Tribunal makes a preliminary remark concerning the Beneficiaries. Mr. Heshmatullah Hajizadeh, one of the Beneficiaries, previously indicated that he does not speak or understand French and that while he speaks and communicates in English, English is not his mother tongue. Consequently, the Tribunal is mindful that Mr. Hajizadeh is doing his best to communicate in a language that is not his mother tongue.

THE FACTS

[12.] The Beneficiaries and the Contractor signed a preliminary contract for the purchase of a town house forming part of a project known as Le Balmoral³, which project was covered by the guarantee plan issued by *Garantie Construction Résidentielle*⁴.

[13.] The Beneficiaries engaged the services of Mr. Yevgeny Govshievich of Home Inspection Services to inspect the town house prior to its acceptance, who prepared the Inspection Report dated February 17, 2020⁵.

[14.] The results of the interior inspection are found at pages 38 to 40 of the Inspection Report. The doors included the sliding doors, were inspected by Mr. Govshievich who did not note any issues with the sliding doors⁶.

³ Exhibit A-3

⁴ Exhibit A-2

⁵ Exhibit A-11

- [15.] On February 17, 2020, the Beneficiaries signed the Pre-Acceptance Inspection Form. The Tribunal refers to page 3 of 4, item 4 “*Kitchen and bathrooms*”, which covers the inspection of the interior bathroom doors. Item number 4.3 dealt specifically with “*Doors: hardware, finish*”. Under the column “*Notes*”, there were no notes included indicating a problem with the bathroom sliding doors⁷.
- [16.] The Beneficiaries complied with the Regulation and filed with the Contractor, a number of claims concerning alleged defects covered by the guarantee plan, resulting in various decisions being rendered by the Manager; Points 2, 3, 4, 12 and 13 of the Decision form part of the Beneficiaries’ request for arbitration⁸.
- [17.] On November 3, 2022, Mr. Hajizadeh informed the Tribunal that the Beneficiaries desisted from Points 2 and 12 of the Decision.
- [18.] Points 3, 4 and 13 are the only points before the Tribunal, summarized below:

Point 3	Quincaillerie de la porte de la salle d'eau / Hardware of door to half bathroom;	DÉCISION:
	Décision 14 mai 2021	À corriger avant le : 14 juillet 2021
	Décision Supplémentaire 28 septembre 2021	Travaux exécutés
Point 4	Déficiences des joints de gypse aux murs et plafond / Deficiencies in wall and ceiling drywall joints	DÉCISION:
	Décision 14 mai 2021	À corriger avant le : 14 juillet 2021
	Décision Supplémentaire 28 septembre 2021	Pris en charge par GCR
Point 13	Ajustement de la porte de la salle d'eau / Adjustment of half bathroom door	DÉCISION: NON RECONNU
	Décision Supplémentaire 28 septembre 2021	

POINTS 3 AND 13

- [19.] At the hearing, Points 3 and 13 were presented together. The parties confirmed that the hardware issue was resolved. According to Mr. Hajizadeh, the deficiencies involving Points 3 and 13 related to “*the bad installation of the*

⁶ Exhibit A-11, page 38 of the report

⁷ Exhibit A-10

⁸ Exhibit A-12

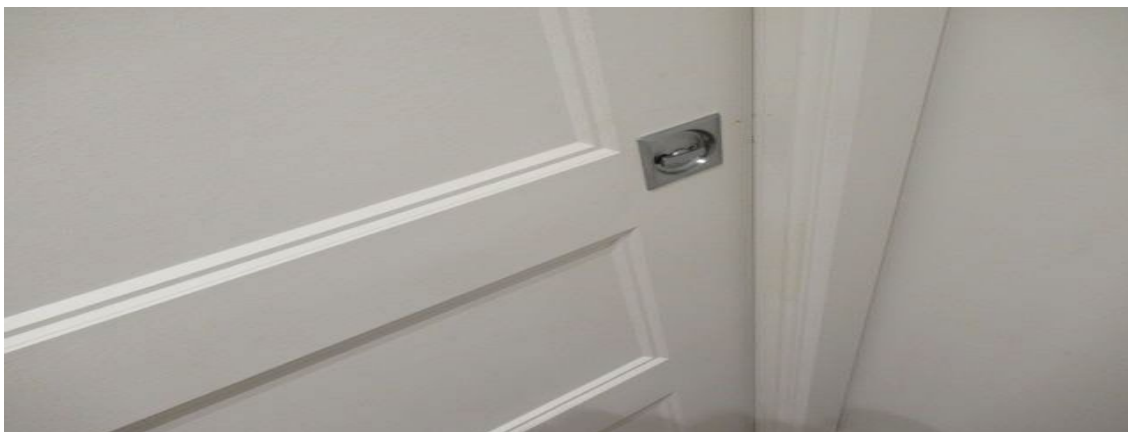
doors”⁹, resulting in the lateral movement of the sliding doors of the bathrooms, when the doors were open or closed.

- [20.] Mr. Hajizadeh stated that there was a gap of approximately 1.5 to 2 cm in the walls into which the doors slide into. The below photograph denotes the door slid into the wall with gaps on both sides of the wall:



- [21.] According to Messrs. Belisle and Pelletier, there are a number of different sliding doors systems. The Contractor used the system which required the installation of only one rail track, without an additional track being installed on the floor.

- [22.] According to Mr. Hajizadeh, the sliding doors when used, move laterally from side to side, making it difficult to close. The issue with the sliding doors concerns the lateral movement of the doors when the doors slide out from inside the wall to close the bathroom doors depicted by the below photograph:



⁹ Exhibit B-1, Beneficiaries' email of August 11, 2021

- [23.] Mr. Pelletier stated that two (2) plastic elements are attached on either side of the sliding doors to ensure that the doors do not come into contact with the walls into which the doors slide into.
- [24.] Mr. Belisle testified that Mr. Hajizadeh's town house was inspected by Mr. Govshievich, the Beneficiaries' choice and a report was prepared and filed as Exhibit A-11. The results of the interior inspection are found at pages 38 to 40 of the report. The doors were inspected¹⁰. Mr. Govshievich did not note any issues with the sliding doors.
- [25.] Mr. Belisle testified that the sliding doors were installed in accordance with the then existing norms and "*règles d'art*". According to him, the rail track was not the source for the alleged deficiency, in that the rail track was properly installed and operated as designed.
- [26.] Messrs. Belisle and Pelletier inspected the doors, and they did not ascertain any lateral movements, when the doors were opened and/or closed. They did not refer to any specific norms covering the installation of the rail tracks and the sliding doors.
- [27.] Mr. Pelletier acknowledged the possibility of lateral movement, but insofar as he was concerned, the doors were properly installed, and he found no evidence of poor workmanship.

POINT 4

- [28.] Point 4 concerned the painting of the "*wall and ceiling drywall joints*" which was already decided by the Manager in the Beneficiaries' favor, pursuant to the decision rendered by the Manager on May 14, 2021¹¹, requiring the Contractor to correct the deficiencies by July 14, 2021.
- [29.] The Contractor was unable to correct the deficiencies by July 14, 2021, resulting in the Manager assuming to perform the corrective work as appears from the Decision¹².
- [30.] The circumstances leading to the Manager's Decision of September 28, 2021, are dealt with hereinafter.
- [31.] According to Mr. Hajizadeh, the Contractor had until July 14, 2021, to paint the affected area, which the Contractor failed to do.
- [32.] On August 26, 2021, Mr. Belisle went to the Beneficiaries' townhouse, but Mr. Hajizadeh did not allow him to enter the premises.

¹⁰ Exhibit A-11, page 38 of the report

¹¹ Exhibit A-12, pages 7-8 of the May 14, 2021, Decision

¹² Exhibit A-12, pages 8-9

- [33.] On September 21, 2021, Mr. Belisle went once again to the Beneficiaries' townhouse, but Mr. Hajizadeh refused once again to allow him to enter the premises.
- [34.] Mr. Belisle explained that the delay in performing the work resulted from the ongoing Covid-19 pandemic.
- [35.] Mr. Pelletier stated that he was present on August 26, 2021, to ascertain whether points 3, 4 and 13 were corrected. He confirmed that the hardware issues involving points 3 and 13 were corrected.
- [36.] Mr. Pelletier confirmed that Mr. Hajizadeh did not allow Mr. Belisle to enter the premises.
- [37.] Messrs. Hajizadeh, Belisle and Pelletier confirmed that on August 26, 2021, Mr. Mr. Hajizadeh and members of his family, were less than respectful in the manner in which they spoke to and treated Mr. Belisle.
- [38.] Mr. Pelletier explained that the only reason for not performing the work since September 28, 2021, was related to the Beneficiaries' request for arbitration.

THE GUARANTEE PLAN AND THE GUARANTEE CONTRACT/BUILDINGS HELD IN UNDIVIDED CO-OWNERSHIP

- [39.] Article 9.3 of the Guarantee Contract/Buildings Held in Undivided Co-ownership ("**Guarantee Contract**")¹³ covers "*poor workmanship*" and is worded as follows:

9.3 Subject to the limitations contained herein, the Administrator is committed in favour of the Beneficiary in the case of failure to comply with their contractual and legal obligations, to repair the existing non-apparent poor workmanship affecting the Building at the moment of the Acceptance of the building and discovered within the first year after the Acceptance of the building provided that such poor workmanship is reported in writing to the Contractor and the Administrator within a reasonable period of their discovery.

[emphasis added]

- [40.] Article 27. (3) of the *Regulation* is worded as follows:

27. La garantie d'un plan dans le cas de manquement de l'entrepreneur à ses obligations légales ou contractuelles après la réception de la partie privative ou des parties communes doit couvrir :

27. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the private portion or the common portions, shall cover

¹³ Exhibit A-2

3° la réparation des malfaçons existantes et non apparentes au moment de la réception et découvertes dans l'année qui suit la réception, visées aux articles 2113 et 2120 du Code civil et dénoncées, par écrit, à l'entrepreneur et à l'administrateur dans un délai raisonnable de la découverte des malfaçons;

(3) repairs to non-apparent poor workmanship existing at the time of acceptance and discovered within 1 year after acceptance as provided for in articles 2113 and 2120 of the Civil Code, and notice of which is given to the contractor and to the manager in writing within a reasonable time following the discovery of the poor workmanship;

[emphasis added]

[41.] Articles 2113 and 2120 of the Civil Code of Quebec are worded as follows:

2113. Le client qui accepte sans réserve, conserve, néanmoins, ses recours contre l'entrepreneur aux cas de vices ou malfaçons non apparents.

1991, c. 64, a. 2113.

2113. A client who accepts without reservation nevertheless retains his right to pursue his remedies against the contractor in cases of nonapparent defects or nonapparent poor workmanship.

1991, c. 64, a. 2113; I.N. 2014-05-01.

2120. L'entrepreneur, l'architecte, l'ingénieur et le technologue professionnel pour les travaux qu'ils ont dirigés ou surveillés et, le cas échéant, le sous-entrepreneur pour les travaux qu'il a exécutés, sont tenus conjointement pendant un an de garantir l'ouvrage contre les malfaçons existantes au moment de la réception, ou découvertes dans l'année qui suit la réception.

1991, c. 64, a. 2120; 2020, c. 15, a. 59.

2120. The contractor, the architect, the engineer and the professional technologist, for the work they directed or supervised, and, where applicable, the subcontractor, for the work he performed, are jointly bound to warrant the work for one year against poor workmanship existing at the time of acceptance or discovered within one year after acceptance.

1991, c. 64, a. 2120; 2002, c. 19, s. 15; I.N. 2014-05-01; 2020, c. 15, s. 59.

[emphasis added]

THE ISSUES AND THE PARTIES' ARGUMENTS

- [42.] The Beneficiaries submit that the deficiencies involving Points 3 and 13 are caused by the Contractor's "*poor workmanship*" involving the installation of the sliding doors.
- [43.] Concerning Point 4, the Beneficiaries insists that the Manager is responsible for the painting.
- [44.] Concerning Points 3 and 13, the Contractor submits that the sliding doors were properly installed and there was no "*poor workmanship*" involved in the installation of the sliding doors.

- [45.] Regarding Point 4, the Contractor submits that it was prevented by the Beneficiaries to perform the work required pursuant to the Decision of May 14, 2021.
- [46.] Concerning Points 3 and 13, the Manager submits that the sliding doors were properly installed and that there was no evidence of “*poor workmanship*” involving the installation of the sliding doors.
- [47.] Concerning Point 4, the Manager is ready to perform the work.

BURDEN OF PROOF

- [48.] It is a well-established principle of law that the burden of proof rests with the Beneficiaries being the parties making a claim before the Tribunal. Article 2803 of the Civil Code of Quebec reads as follows:

“2803. A person wishing to assert a right shall prove the facts on which his claim is based.”

- [49.] In addition, the appreciation of the evidence by the Tribunal is guided by the principles set out in article 2804 of the Civil Code of Quebec, that reads as follows:

“2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.”

- [50.] Article 2811 of the Civil Code of Quebec sets out the manner in which a party discharges the burden of proof, which section reads as follows:

“2811. Proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.”

- [51.] Accordingly, it was up to the Beneficiaries to adduce the evidence susceptible of being made in accordance with the rules of evidence of the Province of Quebec, establishing on the balance of probabilities that the installation of the sliding doors suffered from “*poor workmanship*”. The rules referred to, are means of weighing the evidence presented by the Beneficiaries before the Tribunal¹⁴.
- [52.] The Tribunal is therefore required to consider the Beneficiaries’ evidence establishing on the balance of probabilities the existence of the material facts allowing the Tribunal to conclude that the deficiencies claimed by the

¹⁴ *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282

Beneficiaries concerning the sliding doors, was caused by the Contractor's "*poor workmanship*".

- [53.] In the present instance, the Beneficiaries failed to discharge the burden of proof and convince the Tribunal on the balance of probabilities, the existence of deficiencies which qualified as "*poor workmanship*", for the reasons stated hereafter.

ANALYSIS

POINTS 3 AND 13: MEANING OF POOR WORKMANSHIP

- [54.] What constitutes "*poor workmanship*" within the meaning of article 27.(3) of the *Regulation*? The *Regulation* and/or the Guarantee Contract, refers to but does not define "*poor workmanship*"¹⁵.
- [55.] In the context of the Beneficiaries' request for arbitration, workmanship refers to the Contractor's quality and skill involving the construction of the "*townhouse*"¹⁶, including the installations and equipment necessary for its use¹⁷.
- [56.] Poor workmanship typically arises when a contractor fails to follow industry standard practices, the "*règles d'art*", construction documents, or the manufacturer's installation instructions, resulting in defective work, which may be a sign of poor workmanship.
- [57.] In *Cordeiro et Construction Simon Cousineau inc.*, 060305001 et 090474, 2006-06-29, the arbitrator M^e Masson, dealt with the notion of "*poor workmanship*" and "*règles d'art*" in the following manner:

"[57] Le CONTRAT PRÉLIMINAIRE ET CONTRAT DE GARANTIE, par ailleurs, ne définit pas ce qu'est une «règle de l'art». Il définit cependant «malfaçon» en référant aussi au Code civil du Québec :

"Défectuosité ou défaut de construction tel que visé par les articles 2113 et 2120 du Code civil du Québec."

[58] La jurisprudence est tout aussi silencieuse à l'égard d'une telle définition.

[59] La doctrine non plus n'a pas défini la «malfaçon».

[60] Du Règlement et du contrat préliminaire on tire donc qu'une «malfaçon» est une défectuosité ou un défaut de construction occasionné par le défaut de se conformer aux règles de l'art ou à une norme en vigueur applicable au bâtiment."

[emphasis added]

¹⁵ Exhibit A-2

¹⁶ The townhouse is the "*Building*", the term used in Exhibit A-3

¹⁷ Section 1 of the *Regulation*; section 2.3 of Guarantee Contract, Exhibit A-2; and section 1 of the Preliminary Contract, Exhibit A-3

[58.] In *Sommereyns et 7802471 Canada inc. (Construction des Grands Jardins)*, 2018 CanLII 132576 (QC OAGBRN), the arbitrator Mr. Yves Fournier, cited the authors M^{tres} Olivier F. Kott ad Claudine Roy by describing poor workmanship in the following manner:

“- MALFAÇON

[114] Dans l'ouvrage *La Construction au Québec : perspectives juridiques*⁽¹²⁾, les auteurs Mes Olivier F. Kott et Claudine Roy s'expriment ainsi quant aux malfaçons :

L'article 2120 C.c.Q. garantit l'absence de « malfaçons » dans l'ouvrage immobilier. Il faut donc déterminer le sens précis d'une « malfaçon » contre laquelle l'obligation protège le propriétaire.

Comme son nom l'indique, une « malfaçon » est un travail mal fait ou mal exécuté. Or, un travail donné est considéré « bien » ou « mal » fait selon les normes qui lui sont applicables. Deux types de normes sont couramment employés pour établir l'existence d'une malfaçon. Premièrement, ce sont les conditions contractuelles fixées, que celles-ci soient écrites ou verbales, entre les parties. Deuxièmement, en l'absence de conditions précises expressément arrêtées, recours est fait aux « règles de l'art » qui sont suivies par chaque corps de métier ou secteur pertinent. Les règles de l'art sont considérées comme intégrées par renvoi dans le contrat. Signalons aussi que le travail non fait, ou incomplet, constitue également, de manière implicite, une malfaçon, car il est tout autant contraire aux règles de l'art et non conforme aux stipulations contractuelles.

Il est important de souligner que la malfaçon, aux termes de l'article 2120 C.c.Q. n'est subordonnée à aucune condition par rapport à l'effet qu'elle peut produire. Ainsi, contrairement à la responsabilité légale pour la perte de l'ouvrage de l'article 2118 C.c.Q., il n'est pas nécessaire que le vice ou la malfaçon mette en péril, de manière immédiate ou de manière plus ou moins éloignée, l'intégrité de l'ouvrage. De même, contrairement au vice interdit aux termes de la garantie de qualité de vendeur énoncé par l'article 1726 C.c.Q., il ne paraît pas nécessaire que la malfaçon entraîne une diminution de l'usage de l'immeuble.

[115] Il n'appartient pas au bénéficiaire d'établir la cause d'une malfaçon. Il n'a qu'à établir son existence, ce qui est du domaine de la prépondérance de preuve. Pour être considéré comme malfaçon, le bénéficiaire n'a donc pas à prouver que celle-ci entraînera une diminution quelconque de l'immeuble.

[116] L'article 2120 du C.c.Q. nous enseigne que :

2120. L'entrepreneur, l'architecte et l'ingénieur pour les travaux qu'ils ont dirigés ou surveillés et, le cas échéant, le sous-entrepreneur pour les travaux qu'il a exécutés, sont tenus conjointement pendant un an de garantir l'ouvrage contre les malfaçons existantes au moment de la réception, ou découvertes dans l'année qui suit la réception.

[117] Me Robert Masson qualifiait ainsi la malfaçon :

54. Une malfaçon est un défaut dans un ouvrage qui porte atteinte à la qualité du bâtiment : un manquement aux normes qui assurent que les ouvrages de construction seront faits avec soin; un manquement aux règles qui régissent un métier et qui assurent la perfection de l'ouvrage, dont l'inobservance conduit à un manquement à une obligation essentielle de livrer un ouvrage de bonne qualité (13).

[118] Il n'existe aucun moyen d'exonération (sauf l'expiration des délais applicables ou à des circonstances particulières en l'espèce) à l'égard de l'obligation légale contre les malfaçons mentionnées à l'article 2120 du C.c.Q. Ainsi dès qu'un bénéficiaire relève une malfaçon, l'entrepreneur ou à défaut l'administrateur est tenu à l'exécution.

[119] Il faut souligner qu'il existe deux (2) types de malfaçons. Celle qui est apparente et celle qui ne l'est pas. Le mot apparent peut se définir comme ce qui se montre clairement aux yeux, qui est clairement visible."

[emphasis added]

- [59.] The parties did not file any documents establishing the industry standard practices, construction documents, and/or the manufacturer's installation instructions relating to the installation of the sliding doors.
- [60.] What was the evidence adduced by the Beneficiaries establishing the existence of "*poor workmanship*"?
- [61.] The Beneficiaries were required to establish that the work involving the sliding doors was poorly done or poorly executed.
- [62.] In order to discharge their burden of proof, the Beneficiaries had to either establish that the installation of the sliding doors did not conform with the contractual obligations arising from the preliminary contract dated December 14, 2019¹⁸, or that the installation of the sliding doors was not done according to the standards that apply to it.
- [63.] In the present instance, the Beneficiaries did not adduce any evidence establishing that the Contractor failed to respect its contractual obligations or that the work did not conform to the standards that apply to it.
- [64.] In the absence of such evidence, the Beneficiaries were required to establish that the work was not done in accordance with the known "*règles d'art*" relating to the installation of the sliding doors.
- [65.] The Beneficiaries did not establish that the installation of the sliding doors was not done in accordance with the "*règles d'art*".

¹⁸ Exhibit A-3

POINT 4

- [66.] Point 4 is moot. The Contractor was unable to comply with the Decision rendered on May 14, 2021, since the Beneficiaries did not allow the Contractor to enter the premises and do the work.
- [67.] Mr. Hajizadeh was misguided in his appreciation of the Decision rendered on May 14, 2021. He understood literally that the work had to be performed by no later than July 14, 2021, failing which he was entitled not to allow the Contractor to have access to the premises to do the work.
- [68.] Mr. Belisle explained that the then prevailing Covid-19 pandemic, made it difficult to perform the work by July 14, 2021. Under the circumstances, the Tribunal accepts Mr. Belisle's explanation.
- [69.] The Manager having witnessed the way Mr. Belisle was treated by the Beneficiaries on August 26, 2021, decided to perform the work, to reduce the tensions between the Beneficiaries and the Contractor.
- [70.] The Manager undertakes to perform the work.

ABUSIVE CONDUCT AND THE PAYMENT OF THE COST OF ARBITRATION

- [71.] Article 123 of the *Regulation* governs the payment of the costs and fees of arbitration.
- [72.] The Manager submitted that 100% of the costs and fees of arbitration be awarded against the Beneficiaries, due to the Beneficiaries alleged abusive conduct.
- [73.] According to the Manager, the abusive nature of the Beneficiaries' conduct was established by the initial request for arbitration involving Points 2, 3, 4, 12 and 13 of the Decision, which was subsequently reduced by the Beneficiaries to Points 3, 4 and 13.
- [74.] The Manager had the burden to establish that the Beneficiaries acted abusively, and that the Tribunal pursuant to article 123 of the *Regulation* has the power to sanction the Beneficiaries by condemning them to pay 100% of the costs and fees of arbitration.
- [75.] The Manager failed to adduce any evidence establishing:
- [77.1] That the initial request for arbitration involving Points 2, 3, 4, 12 and 13 which was subsequently reduced by the Beneficiaries to Points 3, 4 and 13, constituted an abusive exercise by the Beneficiaries of their right to seek arbitration;

[77.2] That the Beneficiaries acted in an abusive manner, during the course of the arbitration process.

[76.] The Beneficiaries respected and complied with the various orders rendered by the Tribunal during the virtual management conference held on March 18, 2022¹⁹.

[77.] The mere fact that the Beneficiaries desisted from presenting Points 2 and 12, prior to the hearing, does not constitute abusive conduct, which should be sanctioned by the Tribunal.

[78.] The Manager submitted three (3) decisions in support of its argument that the Beneficiaries should be sanctioned for their abusive conduct and pay 100% of the costs and fees of arbitration, namely:

- *Roy c. Parc sur Rivière-Bromont, S.E.C., Soreconi 180504001;*
- *Cloutier et Lavoie c. La Garantie Qualité Habitation, Centre D'arbitrage Commercial National et International du Québec, file No 02-1204; and*
- *Diane Labrecque et Les entreprises Lachance inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ inc., file N° GAMM: 2007-08-005.*

[79.] In *Roy c. Parc sur Rivière-Bromont*, the arbitrator Me Jacinthe Savoie, held that a beneficiary who failed to attend a conference call for no reason, may be charged certain arbitration costs.

[80.] M^e Savoie dealt with the issue in the following manner:

Couts de l'arbitrage

[70] En réponse a une question du procureur de l'Administrateur, la Beneficiaire a admis avoir loge plus de 50 appels téléphoniques auprès de l'Administrateur pour le traitement de son dossier.

[71] Le procureur de l'Administrateur demande que la Bénéficiaire assume 25% des frais d'arbitrage, et ce, si elle n'a gain de cause sur aucun des points demandes.

[72] Au soutien de cette demande, il soulevé les arguments suivants :

[72.1] qu'en raison des agissements de la Bénéficiaire, l'Administrateur doit monopoliser des ressources considérables;

[72.2] qu'il y a eu une énorme perte de temps dans cette affaire puisque la Bénéficiaire n'était pas prête;

[72.3] les demandes effectuées par la Bénéficiaire sont, à sa face même, non fondées;

¹⁹ The Minutes of the Virtual Management Conference dated March 23, 2022

[72.4] dans la mesure ou aucune sanction n'est appliquée, la situation abusive va perdurer éternellement.

[73] Cette demande rejoint deux demandes formulées par l'Administrateur, soit :

[73.1] en date du 18 juin 2018, le procureur de l'Administrateur précisait «que si l'administrateur GCR se voit éventuellement condamner aux frais du présent dossier, le soussigne tient à souligner que les frais relies a la conférence téléphonique manquée du 14 juin dernier devront être imputes a la bénéficiaire seulement. Celle-ci ne s'est pas présentée au rendez-vous téléphonique et d'ailleurs n'a toujours pas soumis de motifs à cet égard »;

[73.2] en date du 20 juillet 2018, le procureur de l'Administrateur écrivait que : « le soussigne est d'avis que le nombre de communications, documents et demandes faits par Mme Roy au tribunal dans le présent dossier dépasse ce qui est raisonnable. Le présent dossier est soumis à la règle de la proportionnalité comme tout dossier devant les tribunaux de droit commun. Qu'il s'agisse d'un tribunal statuaire n'y change rien.

Le soussigne demande que cela soit pris en considération dans le partage des frais d'arbitrage, même si Mme Roy devait avoir gain de cause sur au moins un des points de sa demande, car tous ces fichiers, demandes et communications deviennent abusifs et engendrent des frais d'arbitrage potentiels pour ma cliente. »

Décision quant aux coûts de l'arbitrage

[106] L'Administrateur demande que la Bénéficiaire soit condamnée à payer 25% des coûts de l'arbitrage pour les motifs indiqués aux paragraphes 71 et 72.2 de la présente et avait également demandé que cette dernière assume les frais liés à la conférence téléphonique du 14 juin 2018.

[107] En premier lieu, il est vrai que la Bénéficiaire ne s'est pas jointe à la conférence téléphonique du 14 juin 2018, malgré la fixation de celle-ci en fonction de ses disponibilités, de la convocation qui lui a été transmise et des tentatives pour la rejoindre après le début de la conférence.

[108] De plus, elle n'a jamais offert d'explication pour justifier cette absence.

[109] En conséquence, le Tribunal considérera les frais encourus ainsi que le temps passe au regard de cette conférence, dans le partage des coûts d'arbitrage.

[110] Toutefois, le Tribunal n'a pas l'intention de tenir compte des ressources investies par l'Administrateur dans le traitement du dossier de réclamation, pour départager les coûts d'arbitrage.

[emphasis added]

- [81.] The Manager tailored its arguments on paragraph 72, subparagraphs 72.1 to 72.4 and paragraph 73, subparagraphs 73.1 and 73.2 of the *Roy* decision. However, the facts in the *Roy* decision are distinct from the facts in the present instance.
- [82.] The Manager did not adduce any evidence establishing the facts set out in paragraph 72, subparagraphs 72.1 to 72.4 and paragraph 73, subparagraphs 73.1 and 73.2 of the *Roy* decision.
- [83.] Mr. Hajizadeh explained why the Beneficiaries desisted from the claims involving Points 2 and 12; he stated that he performed the work himself; he did not want to wait until he was heard on the merit of his claims.
- [84.] The Beneficiaries filed a request for arbitration involving Points 2, 3, 4, 12 and 13 of the Decision pursuant to article 35 of the Regulation. The Beneficiaries had the right to seek arbitration from the Decision rendered by the Manager.
- [85.] More than one month prior to the hearing, the Beneficiaries decided to desist from having Points 2 and 12 of the Decision adjudicated by the Tribunal, which was their right to do so.
- [86.] The reasoning of the arbitrator in the *Roy* decision does not apply in the present instance. M^e Savoie applied articles 116 and 123 of the *Regulation* to split the costs and fees of arbitration, by having the beneficiary and the manager pay \$75.00 each.
- [87.] Concerning the application of article 116 of the *Regulation*, the Tribunal is mindful that article 116 requires an arbitrator to “*decide in accordance with the rules of law; he shall also appeal to fairness where circumstances warrant.*”
- [88.] The Tribunal is of the view that the rules of fairness cannot be used to grant powers to an arbitrator to sanction a beneficiary on the basis that the beneficiary acted abusively. While article 51 and following of the Code of Civil Procedure grants such powers to a court, the Code of Civil Procedure is not incorporated into and does not form part of the *Regulation*; the Code of Civil Procedure does not apply to the *Regulation*.
- [89.] The use of fairness does not permit an arbitrator to use the notion of abusive conduct and sanction a beneficiary, when the legislator did not specifically grant such powers to an arbitrator.
- [90.] In *Cloutier et Lavoie c. La Garantie Qualité Habitation, Centre D'arbitrage Commercial National et International du Québec*, the arbitrator Mr. Guy Dubois dealt with the costs of arbitration in the following manner:

“FRAIS D'ARBITRAGE

L'article 63 du Règlement d'arbitrage sur le plan de garantie des bâtiments résidentiels neufs prévoit que les coûts d'arbitrage sont à la charge de l'administrateur lorsque le demandeur est le bénéficiaire à moins que le bénéficiaire n'obtienne gain de cause sur aucun des aspects de sa réclamation, ce qui est le cas dans le présent arbitrage.

Le tribunal arbitral est d'avis que les demandeurs savaient ou auraient dû savoir que leurs demandes concernant les points 3 et 4 étaient abusives.

Conséquemment, la totalité des frais d'arbitrage devra leur être attribués par le Centre d'arbitrage commercial national et international du Québec."

[emphasis added]

[91.] The arbitrator in the *Cloutier et Lavoie* decision did not deal with article 123 of the *Regulation*.

[92.] The evidence adduced by the Manager does not allow the Tribunal to conclude that the Beneficiaries knew or ought to have known that the claims concerning Points 3 and 13 were abusive. The Beneficiaries' claims are dismissed due to their failure to adduce evidence establishing the "*poor workmanship*" relating to the installation of the sliding doors. Had the Beneficiaries discharged their burden of proof by introducing evidence establishing their claims, the outcome might have been different.

[93.] In *Diane Labrecque et Les entreprises Lachance inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ inc.*, the arbitrator Mr. Claude Dupuis dealt with the cost of arbitration in the following manner:

"Coûts d'arbitrage

[42] L'entente précédemment décrite intervenue entre la bénéficiaire et l'entrepreneur en ce qui concerne deux éléments de la demande d'arbitrage, soit le point 5 (Absence d'une pharmacie dans la salle de bain - Allocation demandée) et le point 11 (Hauteur de l'échappée de l'escalier menant au sous-sol), n'engage en rien la responsabilité de l'administrateur de la garantie.

[43] Ainsi, conformément au deuxième alinéa de l'article 21 du Règlement sur le plan de garantie des bâtiments résidentiels neufs, le soussigné départage les coûts du présent arbitrage de la façon suivante : 50 % à la bénéficiaire et 50 % à l'administrateur."

[emphasis added]

[94.] The arbitrator in the *Labrecque* decision did not determine that the beneficiaries acted abusively. The arbitrator split the costs evenly. To be noted that the decision did not deal with the application of article 123 of the *Regulation*.

[95.] The case of *Pickard v. Olivier*, 2012 QCCA 28, decided by the Quebec Court of Appeal, stands for the proposition that article 123 of the *Regulation* cannot be used to sanction a party for abusive conduct.

[96.] In *Pickard*, the Court of Appeal dealt with a claim formulated before the rental board and whether the rental board had the jurisdiction to award damages in a case involving abusive conduct.

[97.] The Court of Appeal held as follows:

L'ANALYSE

[10] Le jugement de la Cour du Québec est conforme aux enseignements de la Cour supérieure dans l'affaire *9103-0049 Québec inc. c. Cour du Québec*, [2009] R.D.I. 803, 2009 QCCS 39841, qui rappelle la compétence limitée de la Régie et l'absence de disposition statutaire lui permettant de sanctionner les procédures abusives :

[25] La Régie du logement n'est pas investie du pouvoir inhérent conféré aux tribunaux « de rendre toutes ordonnances appropriées pour pourvoir aux cas où la loi n'a pas prévu de remède spécifique » (art. 46 C.P.C.). Seuls les tribunaux et les juges désignés à l'article 22 C.P.C. possèdent ces pouvoirs inhérents.

[26] Bien que l'article 86 de la loi habilitante permette la possibilité d'avoir recours à une procédure supplétive, en l'absence de dispositions particulières, en l'espèce, il ne s'agit pas de suppléer à une règle de procédure mais d'entraver l'exercice d'un droit.

[27] Le juge La Forest rappelle à ce sujet :

[...] il n'est pas toujours facile ou simple de distinguer ce qui touche au fonctionnement du tribunal de ce qui est irrévocablement lié à son produit.

[28] En cas de doute, la prudence est de mise :

Une mesure législative ne devrait être qualifiée de procédurale que si cela ne fait aucun doute. S'il y a un doute, on devrait le dissiper en concluant que la mesure législative est une règle de fond.

[29] La Régie ne peut pas non plus fonder son pouvoir de sanctionner les abus de procédure par le biais des articles 4.2 et 54.1 à 54.6 C.P.C., puisque, sauf pour les règles de preuve qu'il contient (art. 2811 C.C.Q.), le Code de procédure civile ne s'applique pas à la Régie.

...

[30] La demanderesse soulève également l'argument voulant que la Régie puisse prendre compétence et rendre une décision sur toute question relevant d'elle en vertu de la maxime « l'accessoire suit le principal ». Selon elle, si la Régie a le pouvoir d'accorder ou de rejeter une demande en rétractation, elle peut certes rendre toute décision relative à sa procédure.

[31] Le Tribunal considère cet argument non fondé puisqu'il ne s'agit pas d'encadrer ou encore de gérer une procédure mais bien d'empêcher un justiciable de faire valoir ses droits."

[emphasis added]

- [98.] The Court of Appeal acknowledged that subsequent to the decision rendered by the Superior Court, which was before it, the relevant legislature was amended allowing the sanctioning of a party who acted abusively.
- [99.] As previously stated, the Tribunal is of the view that the rules of fairness cannot be used to grant powers to an arbitrator to sanction a beneficiary on the basis that the beneficiary acted abusively. It is up to the legislator to grant such powers to an arbitrator.
- [100.] The decisions cited by the Manager do not support the argument advanced by the Manager. In the absence of clear dispositions prescribed by the *Regulation* permitting the Tribunal to sanction the Beneficiaries for allegedly having acted abusively, articles 116 and 123 do not allow the Tribunal to sanction the Beneficiaries for alleged abusive conduct. In any event, the Manager failed to establish that the Beneficiaries acted in an abusive manner.
- [101.] Article 123 of the *Regulation* expresses the legislator's intention concerning the awarding of the costs of arbitration; in the event that the Beneficiaries fail *"to obtain a favourable decision on any of the elements of his claim, ... the arbitrator shall split the costs"*.

CONCLUSION

- [102.] The facts of each case are different. It is up to the Tribunal to assess the facts adduced by the Beneficiaries establishing the *"poor workmanship"* concerning the installation of the sliding doors.
- [103.] The Beneficiaries failed to discharge their burden of proof and consequently, their request for arbitration concerning Points 3 and 13 is dismissed.
- [104.] Concerning Point 4, the Manager is ordered to complete the work within a delay of sixty (60) days following the present Arbitration Award.
- [105.] In accordance with article 123 of the *Regulation*, seeing that the Beneficiaries have failed to obtain a favorable decision concerning Points 3 and 13, the Tribunal must determine the division of the fees to be borne by the Manager and the Beneficiaries.
- [106.] Consequently, the costs and fees of this arbitration, in accordance with articles 116 and 123 of the *Regulation*, shall be apportioned \$50.00 to be paid by the Beneficiaries, with the remainder being paid by the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

- [107.] **DISMISSES** the arbitration demand and claims formulated thereunder by the Beneficiaries involving Points 3 and 13;
- [108.] **MAINTAINS** the Manager's decision dated September 28, 2021, concerning Points 3, 4 and 13;
- [109.] **ORDERS** the Manager to perform the work involving Point 4, within sixty (60) days following the rendering of the present Arbitration Award, according to the applicable norms and "*règles de l'art*".
- [110.] **ORDERS** in accordance with article 123 of the *Regulation*, that the costs and fees of arbitration be split as follows: the Beneficiaries shall pay \$50.00 with the remainder of the costs and fees to be paid by the Manager.

Montreal, February 6, 2023



M^{TRE} TIBOR HOLLÄNDER
ARBITRATOR